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NHSProviders

BREXIT IMPLICATIONS FOR COMPETITION AND PROCUREMENT LAW IN THE NHS

This briefing explores the implications of the UK leaving the European Union (EU) ('Brexit') on the application of competition and procurement law within the NHS. In doing so, it considers the main pillars of competition and procurement law that apply to the NHS. There remains a degree of uncertainty over the precise terms of the UK's withdrawal, particularly in relation to the European Court of Justice (ECJ). However, the working assumptions in this briefing are that the UK will opt to leave the European Economic Area (EEA), membership of the single market and ending the jurisdiction of the ECJ, which has been the basis for the government's negotiating position.

KEY MESSAGES

- The impact of EU competition and procurement rules on the NHS has proved a highly contentious and polarising issue. Some of the optimism about the scope of change Brexit might enable can be traced back to the perception that EU law is a barrier to reform of how competition or procurement is applied to the NHS.
- In an NHS Providers' pre-referendum survey, over two-fifths (42%) of NHS foundation trusts and trusts who responded felt that leaving the EU would have a positive impact on procurement and competition rules.
- Fundamentally, leaving the EU will not lift all the constraints that the NHS is subject to in terms of competition or procurement. The reasons for this are two-fold.
    - UK competition and procurement rules are unlikely to change radically in the short term following the UK's exit from the EU. This is due to the fact that the relevant EU Directives are already embodied into UK law and will remain effective post-Brexit. The UK government would need to repeal or amend these if it wished to move away from the current arrangements.
    - While a substantial component of UK competition and procurement law is grounded in EU law, this is not exclusively a Brexit issue. The Competition Act 1998, NHS Improvement's (NHSI) (previously Monitor's) provider licence and the NHS Procurement, Patient Choice and Competition Regulations 2013 which implement s.75 of the Health and Social Care Act 2012 – all originating from decisions of successive UK government rather than being an EU imposition – will continue to prohibit anti-competitive behaviour by NHS providers and commissioners. Amending these provisions depends ultimately on political will.
- Which of the current EU-derived or national (NHS-specific) competition and procurement law a future UK government would choose to repeal, amend or simply preserve is more of an open question. Within a post-Brexit landscape, there would be an opportunity (which also exists at present to an extent) to modify the rules, particularly to better align with the national policy direction, such as the move towards more collaborative models of care delivery set out in the NHS five year forward view.
- Part of the difficulty of ascertaining the likely impact of Brexit on procurement or competition is compounded by the lack of clarity around the UK's future trading relationship with the EU and other countries. It is possible that future trade agreements negotiated by the UK will impose obligations when it comes to procurement or competition. Also, in the event that the World Trade Organisation (WTO) procurement regime were to apply, this is not wholly dissimilar to the EU rules.
- Ultimately, the scope for change will not depend so much on Brexit itself but depend on the policy stance of the UK government towards competition and procurement in the NHS.

- Regulation of public procurement will continue to be necessary when the UK leaves the EU in order to ensure best value for money from health and other areas of public spending. It is also important that NHS foundation trusts and trusts continue to be able to procure goods and services in an efficient and fair manner. The government should explore opportunities to simplify procurement procedures or introduce more flexibility to the extent that this might be possible under the terms of agreement that would regulate the UK's future relationship with the EU.

European Union (Withdrawal) Bill

The UK government has now published its Bill which seeks to repeal the European Communities Act 1972 and make a series of other provisions in connection with the UK's withdrawal from the EU. The official title is European Union (Withdrawal) Bill, a change to the previously coined title – The Great Repeal Bill.

The Withdrawal Bill seeks to replicate the substance of existing EU law into domestic law. The key statement of principle in the White Paper published in March was as follows: "*In order to achieve a stable and smooth transition, the government's overall approach is to convert the body of existing EU law into domestic law, after which Parliament (and, where appropriate, the devolved legislatures) will be able to decide which elements of that law to keep, amend or repeal once we have left the EU. This ensures that, as a general rule, the same rules and laws will apply after we leave the EU as they did before".* The purpose of this is to guarantee the greatest possible legal continuity at the point of exit. The government has nonetheless made clear that secondary legislation passed under this Bill will "*not be a vehicle for policy changes".*

The Withdrawal Bill is a complex piece of legislation. However, by way of summary it contains provisions seeking to:

- Remove the applicability of EU law in the UK by repealing the European Communities Act (ECA) 1972 (clause 1).
- Transfer into UK law EU regulations which currently have direct effect in UK law, so they continue to have effect once the ECA has been repealed (clauses 2 to 4). This will have less impact when it comes to the rules governing competition and procurement law in the UK, as most of the relevant provisions in these areas emanating from the EU have already been transposed and are now standalone legislation in the UK in their own right. Parliament will have the ability to decide which laws to amend or repeal post-Brexit.
- Clarify the status of 'EU-retained law' (clause 5) – this provides that if a conflict arose between pre-exit domestic legislation and retained EU law, retained EU law will prevail in keeping with the supremacy principle that applies to EU legislation currently. For example, EU-derived procurement-related regulations will be covered and fall into the category of 'EU-retained law'. The bill also provides that post-withdrawal UK legislation will take priority over retained EU law.
- Remove the jurisdiction of the ECJ over UK law (clause 6) – pre-Brexit cases will continue to bind UK courts but not in quite the same way as before. The Supreme Court can decide to depart from pre-Brexit EU decisions on the same basis as it departs from its own case law, only doing so sparingly. Therefore, existing EU case law in the field of competition or procurement will continue to apply and will only be able to be altered by later rulings of the Supreme Court. Decisions made by the ECJ on or after exit day will not be binding, but UK courts may have regard to these if they consider appropriate.
- Give the government delegated powers to amend laws to 'correct' the statute book, where necessary, to rectify problems, inconsistencies and irrelevances occurring as a consequences of leaving the EU (clauses 7-8), for example those that relate to EU processes or institutions.

What does Brexit mean for competition law in the NHS?

Sources of current legislation – competition
There are several components of UK competition law that apply to the NHS, some with roots in EU law but others that are domestic in origin or that have been introduced through NHS-specific legislation. EU competition law is derived from two principles set out in the Treaty of the Functioning of the EU (TFEU):

- Article 101 TFEU prohibits agreements between two or more independent market operators which restrict competition.
- Article 102 TFEU prohibits firms holding a dominant position in a given market from abusing that position, for example by setting excessive prices or preventing other organisations from competing on their merits.

The TFEU prohibitions can be applied directly to UK bodies by both the European Commission (EC) and the Competition and Markets Authority (CMA).

The Competition Act 1998 replicates the set of prohibitions outlined in the TFEU, with Chapter I of the Act prohibiting anti-competitive agreements and Chapter II prohibiting abuse of a dominant position. These are enforced by the CMA but NHSI has concurrent powers with the CMA to enforce the Act in the health sector. The other central pillar of competition law in the UK is the Enterprise Act 2002. Part 3 of this Act establishes the UK merger control provisions.

Under the Health and Social Care Act 2012, NHSI also has the power to prevent anti-competitive conduct through its licensing regime for NHS providers. The current provider licence includes rules which prohibit entering into agreements that restrict competition and goes against the interests of people who use health services. NHSI's powers complement rather than replace general UK competition law. Anti-competitive behaviour by commissioners is further prohibited under the Procurement, Patient Choice and Competition regulations (also known as the s.75 regulations), made under the same Act.

What will Brexit mean for the competition landscape?
Post-exit, the TFEU will no longer apply to the UK. However, as stated above, the substance of UK competition law is broadly comparable to that of EU competition law – chapters I and II prohibitions in the CA98 are modelled on those contained in Articles 101 and 102 of the TFEU. Withdrawal from the EU (and consequently the TFEU) still preserves the Competition Act in place, as well as NHSI's provider licence conditions and the s.75 regulations.

Given how competition law is also governed by national and NHS-specific legislation, it is within the gift of the government to amend these, irrespective of Brexit. It would be possible to legislate to ensure that NHS organisations no longer qualified as 'undertakings' under the Competition Act, while also seeking to repeal the relevant parts of NHSI's provider licence and the Procurement, Patient Choice and Competition regulations.

Implications for S.60 of the Competition Act
One possible change relates to s.60 of the Competition Act, which as it stands it requires UK competition law to be interpreted as far as possible consistently with EU law and decisions of the EU courts and the EC. This requirement is likely to be removed, especially considering that the government has made leaving the jurisdiction of the ECJ a key priority or redline for Brexit. However, any changes are unlikely to extend beyond jurisdictional aspects, such as s.60. In practice, the effects of removing the current link would not arise immediately and also EU case law is likely to remain influential and continue to have persuasive force in UK proceedings (as is the case in other non-EU jurisdictions). Brexit may, however, create the conditions for the emergence of a divergent approach under UK and EU competition law over the longer term.

Implications for existing EU case law

As already mentioned, the provisions in the Withdrawal Bill will give effect to ECJ case law up to the point of Brexit. Clause 6 (1) clarifies that UK courts are not bound to follow judgments of the ECJ given after the UK leaves the EU, but can have regard to them if they consider it appropriate (clause 6(2)). Queries have recently arisen whether the formulation in the Bill provides sufficient clarity for the judiciary. Clause 6 (3) provides that questions relating to the 'validity, meaning and effect' of retained EU law should be decided in line with ECJ decisions before Brexit. This would include any ECJ's pre-Brexit decisions in relation to competition law.

However this interpretative obligation does not apply where retained EU laws have been modified, unless applying retained case law is consistent with the purpose of the modification (clause 6(6), clause 5(3)). This however raises questions about how the courts will determine this.

Implications for the merger control regime

NHS mergers involving foundation trusts are regulated by the CMA, while mergers between NHS Trusts are reviewed by Monitor, which then provides advices on competition issues to the Trust Development Authority (a process now contained within NHSI). Under the current EU rules, mergers that satisfy the EU thresholds have to be notified to and approved by the European Commission before they can be implemented. They are granted an EU-wide clearance. As NHS mergers are unlikely to fall under the scope of the EU level merger regime (under the EU merger regulation), the UK's withdrawal from the EU would have a limited impact.

The EU merger regulation introduced a so-called one stop shop regime, under which all transactions which have an EU element are no longer subject to the merger control regime(s) of the relevant member state(s), although some exceptions do exist. Once the UK is no longer a member state and in the absence of any specific arrangements negotiated with the EU, the EU merger regulation and the future system of merger control in the UK would run in parallel and there would be a parallel review by the EC and CMA. However, as mentioned above, the issue of parallel review is likely to affect less NHS trusts as mergers in this area do not normally have an EU dimension.

What is more likely to be impact by Brexit is how competition legislation is enforced. It is likely that more mergers that would have been previously referred to the EC will now be notified to the CMA with a greater strain on CMA's resources. Post-Brexit, there is potential for the CMA to see an increase in its workload in terms of the number of mergers notified but also the size and complexity of those mergers. As a result of Brexit, the CMA may face greater pressures from having to dedicate more resources to reviewing more complex deals. This raises the question of whether and how having to undertake a heavier merger caseload may affect the CMA's enforcement priorities post-Brexit.

What does this mean for procurement law in the NHS?

Sources of current legislation – procurement

NHS procurement is governed by both the 2015 Public Contracts regulations (PCRs) and the Procurement, Patient Choice and Competition regulations, the latter introduced through the Health and Social Care Act 2012.

The PCRs transpose EU public procurement directives into UK law. The most recent PCRs implement the EU's public sector procurement directive (2014/24/EU). For procurement of clinical services, a 'light touch' regulatory regime applies so that only service contracts over €750,000 must be advertised on an EU procurement portal (Official Journal of the European Union – OJEU), and these must also comply with rules ensuring that the principles of transparency and equal treatment of economic operators are respected. Therefore, public procurement, too, is an area where EU law currently provides the basis for the UK legal framework, but as rules although derived from the EU

have now been enshrined within UK law, it seems likely that these will continue to apply in much the same form in the aftermath of Brexit, for the short term at least.

The NHS sectoral regulations stand alongside the EU Directive and the PCRs. The purpose of this duplication is – at least in part – to allow disputes to be resolved by way of complaint to NHSI, rather than by way of court action.

What will Brexit mean for the procurement landscape?
Much procurement legislation currently applicable in the NHS derives from EU legislation. As with competition law, as the relevant legislation such as the EU procurement directive has already been transposed into UK law, this will remain applicable until any changes are made, which will be a matter for the government and parliament.

Post-Brexit, NHS trusts and commissioners will have to continue to abide by their obligations under UK law, including those derived from EU law. This means that the two sets of regulations – PCRs and NHS Procurement, Patient Choice and Competition Regulations 2013 will remain unchanged unless and until the government decides to make any changes (an alternative to the use of OJEU will need to be found).

At present, the NHS specific considerations do not sit easily alongside the light touch regime which requires all contracts above the threshold to be advertised. As the PCRs originate from EU law, they currently take precedence over NHS regulations under s.75 on grounds of the principle of sovereignty of EU law. As the White Paper has indicated and as the Withdrawal Bill seeks to give effect to, the government's intention is that "*if, after exit, a conflict arises between two pre-exit laws, one of which is an EU-derived law and the other not, then the EU-derived law will continue to take precedence over the other pre-exit law*". This is likely to perpetuate the current tension between the two sets of regulations in the post-Brexit landscape, unless the government takes the opportunity to clarify this.

Irrespective of Brexit, though, the government may choose to repeal Part 3 of the Health and Social Care Act 2012 and, along with it, the Procurement, Patient Choice and Competition Regulations 2013. That would not be sufficient as that would leave the other layer derived from the PCRs still in place, so changes in both respects would be necessary.

What we do not know yet

As discussed above, it is unlikely that Brexit will result in significant changes to the underlying rules on competition or procurement in the short term. With EU-derived competition and procurement law already enshrined into UK legislation, we can expect these areas to be relatively shielded from, and largely unaffected by, the effects of leaving the EU for the foreseeable future.

The difficulty of ascertaining what the likely impact of Brexit on competition and procurement is compounded by the uncertainty surrounding any future relationship with the UK and beyond. An important point to note is that similar rules to the current EU procurement law would be likely to come back into play subject to the provisions of the EU withdrawal arrangements or through subsequent trade agreements.

On procurement, the future might be based on the framework that the EU uses with other trading partners under the WTO's government Procurement Agreement (GPA). Once the UK revokes the ECA, it will no longer be subject to the commitments the EU has signed up to on behalf of the UK in the WTO GPA through its membership of the EU, but is likely to re-join as an individual party.

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Where does all of this leave us?

The current regulations around competition and procurement will remain as they are for the period the UK will negotiate its departure and possibly longer, depending on the shape of any transition agreement the government may negotiate. The consequences of Brexit in this area, as in many others, remain unclear but it is difficult to see there being significant changes to competition or procurement law in the NHS in the short term. The EU-derived legislation in this area will remain part of domestic law until the government may decide to change it. However, to the extent that post-Brexit the UK will have a freer hand to alter the competition and landscape in the NHS, changes will have to take their place in the queue for parliamentary time. These constraints aside, whether the current rules will continue to apply as now or might be amended post-Brexit will depend essentially on future political decisions, both in terms of the UK's relationship with the EU but also on what the role of competition should be in the future.

It is important that competition law is not seen as a barrier to new ways of working in patients' interests, particularly given the renewed focus on collaboration and integration within the NHS five year forward view and its more recent Next steps update. Some indication of the direction of travel can also be gleaned from recent commitments made as part of election manifestos[1]. Current reforms are geared towards collaboration through the development of sustainability and transformation partnerships (STPs) and the creation of accountable care organisations (ACOs) and systems. The stronger emphasis on collaboration in place of competition in the NHS has also been acknowledged by the CMA in a recent merger decision which stated that "*competition in the NHS is only one of a number of factors which influence the quality of services for patients*" but *"not the basic organising principle for the provision of NHS services"*. It argued that *"more important are considerations such as the increasing demand for NHS services and greater degree of clinical specialisation being sought, and the regulatory, policy, and financial context within which such services are provided"*.

A more pragmatic approach to the application of the current rules is to be welcomed, albeit changes may eventually be needed to ensure the legislative framework keeps pace with the direction in which the sector is developing. At the same time, this should not detract from the pursuit of changes that can be achieved within the context of the current framework, such as a transforming commissioning into a more strategic function.

For more information, you may also want to read our blog *"Could Brexit change competition and procurement in the NHS?"*

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[1] The Conservative Party's manifesto included a commitment to "consult and make the necessary legislative changes. This includes NHS's own internal market, which can fail to act in the interests of patients and creates costly bureaucracy". The Labour Party's manifesto committed to the repeal of the Health and Care Act 2012 as a means for dis-applying competition law from the NHS.